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No. 89-266

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1989

PORTLAND GENERAL ELECTRIC COMPANY,
Petitioner,

vs.

MONTANA DEPARTMENT OF REVENUE, et al.,
Respondents.

APPLICATION TO FILE BRIEF AMICI CURIAE AND BRIEF OF AMICI CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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I

APPLICATION FOR LEAVE TO FILE BRIEF AMICI CURIAE, INTERESTS OF AMICI CURIAE AND REASONS FOR APPEARANCE

Amici Curiae Pacific Gas and Electric Company, Southern California Edison Company, the Department of Water and Power of the City of Los Angeles, San Diego Gas and Electric Company, the Sacramento Municipal Utility District, the Northern California Power Agency, the Transmission Agency of Northern California, M-S-R Public Power Agency and the Southern California Public Power Authority are publicly and privately owned utilities and joint action agencies which together generate, transmit, purchase and distribute more than 90 percent of the electrical power used in the State of California. They are responsible for delivery of electrical power to more than 26 million people. Amicus Curiae Edison Electric Institute is an association of the nation's investor-owned electric utility companies. Its members

serve 95 percent of all customers whose electric power needs are met by the investor-owned segment of the electric utility industry. They generate approximately 77 percent of all the electricity used in the country, and serve 73 percent of all ultimate consumers of electricity in the nation.

Because of the magnitude of the electric power requirements amici are required to meet and because much of that power is supplied from outside the State of California, amici have a unique perspective on the effect of taxes like the challenged Montana tax on the interstate power transmission system. For this reason, amici believe the Court would be assisted by a brief focusing on the impact of "beneficial use" taxes, like the Montana tax, on the many and varied cooperative arrangements that form the backbone of the interstate power transmission system in the Western United States.

As Appendix A attached to this brief shows, Petitioner Portland General Electric Company has consented to the filing of such a brief. As Appendix B shows, the consent of the Montana Department of Revenue could not be obtained.

Amici are vitally interested in the validity of Montana's attempt to tax Portland General Electric Company in Case No. 89-266 and the other Colstrip plant owners in Case No. 89-364 [*Pacific Power & Light Co. v. Montana Department of Revenue*] on the basis of their purported "beneficial use" of federally owned power lines which transmit power interstate.[1] If Montana can impose this tax on the Colstrip owners, then any state can impose a similar tax on any one of amici any time they transmit or receive power utilizing federally owned and operated transmission facilities whether or not amici have other contacts with the taxing state. Since federally operated transmission facilities account for approximately 80 percent of the transmission lines located in the Pacific Northwest, the prospect of such taxes poses serious concerns to amici.

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[1] Amici respectfully request that their brief in this case be considered with regard to the arguments presented in the petition in Case No. 89-364 as well.

Amici's fears are not without foundation. As the petition before this Court shows, the State of Oregon is contemplating the imposition of a similar tax on the interstate transmission of power over federally owned lines if this Court does not act to strike down Montana's tax. Amici would be directly affected by the imposition of the Oregon tax since their power purchase and exchange contracts with federal, public and private power providers extend into Oregon and involve the transmission of power over federal lines interstate into California. Moreover, there is no reason to suspect that the imposition of these "beneficial use" taxes would end with the State of Oregon. New Mexico and several other states unlawfully attempted to discriminatorily tax the generation of power transmitted interstate until this Court acted to stop that abuse. *Arizona Public Service Co. v. Snead*, 441 U.S. 141 (1979).

As shown in the accompanying brief, unlimited and unrestrained discriminatory taxation on the transmission of power on federally owned interstate lines will have severe adverse economic and practical effects on amici and on the millions of customers they serve. The possibility of multiple taxation by each of these states puts at risk years and hundreds of millions of dollars of resource planning and acquisition intended to minimize or avoid the use of existing thermal electric generating stations (which are primarily fossil-fuel plants) and the construction of new plants. Either continued use or construction of such plants would have long-term adverse environmental effects.

Amici have reviewed the briefs on appeal before the Montana Supreme Court, the opinion of the Supreme Court of the State of Montana, and the Petition for Certiorari in this case. In view of the importance of the issues presented to the future transmission, distribution and sale of electric power by each of these amici, they believe that a further brief addressing the burdens created by taxes such as Montana's in the context of the current system for transmitting power interstate would be both helpful and appropriate.

DATED: September 8, 1989.

Respectfully submitted,

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BRIEF OF AMICI CURIAE

I

MONTANA'S BENEFICIAL USE TAX POSES A SERIOUS THREAT TO THE INTERSTATE TRANSMISSION OF ELECTRICAL POWER IN THE WESTERN UNITED STATES

Montana has enacted a tax which it has gone to great pains to describe as nothing more than "a beneficial use real property tax" to be levied, not on the interstate transmission of electric power, but only on "the contractual right" to use federally exempt property. Montana then contends that this case simply presents a challenge to a garden-variety "possessory interest tax" of the type approved by this Court in *United States v. County Of Fresno*, 429 U.S. 452 (1977). To understand the fallacy of that description and the mischief the tax will engender, it is first necessary to understand the system of electric power transmission in place across much of the United States, particularly in the central part of the West Coast, the Pacific Northwest and the inland Southwest.

Power is transmitted in these regions by means of numerous cooperative arrangements involving federal power marketing agencies and publicly and privately owned utilities.[1] Many of these utilities and agencies own transmission lines, and collectively they form an interconnected, integrated network over which power flows.[2] This network is used predominately for three types

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[1] The relevant federal agencies are in the Pacific Northwest, the Bonneville Power Administration (BPA), and in the west and southwest, the Western Area Power Administration. These agencies sell the power generated at the large number of federally owned dams in their regions to both publicly and privately owned utilities. They also own and operate extensive transmission facilities used to deliver the power they sell and to provide transmission service.

[2] Electricity will flow over all paths available to it, in different amounts depending on the characteristics of each line. In general, more electric power will flow over lines at higher voltages with less power lost to resistance. This is why very high voltage lines are used for long

of electrical transactions which are typically interstate: seasonal exchanges, economy energy and baseload power. A large trade in all three types occurs to secure economic and often environmental benefits. Seasonal exchanges are made to defer the need for new generating plants, which have large capital costs and often create environmental and safety concerns as well. These exchanges rely on the fact that different regions have their peak electrical power needs at different times of the year. For example, California experiences its peak demand in the summer, while the Pacific Northwest has its peak in the winter. Instead of each region building generating plants to handle peak needs, utilities use their spare capacity in their "off season" to supply energy to those in the other region, receiving energy back during their peak demand period. *See,* Meek, *Pacific Northwest Conservation For California: The Mutual Benefits Of Long-Term Cooperation*, 13 Envtl. L. 841, 849-850 (1983) (Meek).

Economy energy is energy surplus to one utility's system which can be sold on the spot market to other utilities because the energy can be priced lower than the buyer's short-run marginal production cost. When this is surplus hydroelectric energy, it results in environmental benefits as well as economic ones because it displaces the use of fossil fuels and results in substantial savings to customers.

Finally, baseload power is used to supply ongoing needs of customers. Often a baseload power plant is located some distance from loads because of cost savings and environmental considerations. The result is that utilities in California alone obtain large portions of their electricity from utilities and agencies in Oregon, Montana, Washington, Idaho, Nevada, New Mexico and Arizona. Similarly, utilities in Oregon may obtain significant amounts of electricity from Washington, Idaho, Montana, Wyoming, Utah, and California.

It is only through an integrated interstate transmission network that this vast bulk power market can function. This market offers

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distance transmission. In the west this usually means 500 kilovolt (kV) lines, although for shorter distances, 230- and 115- kV lines are used. Lower voltage lines are used for distribution of power at the local level.

not only environmental benefits, but significant cost savings for consumers throughout the western United States.[3] Even though transmission lines are expensive, the power exchange transactions they make possible more than pay for their cost. This network also makes the systems it links more reliable, because if one source of power is suddenly unavailable due to a forced outage, another source can be made available to keep up with the demand. Thus, these cooperative arrangements result in a large, integrated electrical transmission system that has a number of significant advantages for the public:

—it accommodates seasonal peak demands and provides for relatively inexpensive exchanges of power;

—it promotes reliability by connecting many sources of power and minimizing the severity of any single plant or line failure;

—it provides for routing over direct pathways, thereby reducing losses and other costs to utilities and their customers; and

—it is an environmentally sound method of satisfying the public's need for reasonably priced electric power, which is essential to maintaining the quality of life in the United States.[4]

The Montana tax at issue in this case (and the precedent it will set for other states) poses a serious threat to the efficient bulk power market using this integrated transmission system, particularly those parts of it that are federally owned and operated. If, as Montana maintains, a mere service contract for transmitting

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[3] Other regions of the country have similar large scale bulk power markets and transmission networks.

[4] The alternatives to economical interstate transmission of power, including surplus hydroelectric energy, are highly undesirable. In California, for example, further development of intrastate hydroelectric resources would require the damming of the few remaining wild rivers and displacement of wildlife. Thermal power plants, on the other hand, are at least as difficult an alternative because of air quality and other environmental concerns.

power over federal lines provides a sufficient basis for a state to tax the "use" of such lines located in that state, the impact on amici and their millions of customers would be enormous. That impact would first be felt on the federal portion of the integrated transmission system. Then the taxes would affect the bulk power market dependent on those transmission lines, and finally the utilities in that market and their retail customers would feel the impact. In short, unfettered discriminatory taxation of one portion of the integrated system will have an inevitable ripple effect on other parts since, despite the diversity in the utility industry, all its constituent members, especially those doing business in the Pacific Northwest, "are interconnected physically by a transmission grid and institutionally by the region's large-scale wholesaler of electricity, the federal Bonneville Power Administration." Blumm, *The Northwest's Hydroelectric Heritage: Prologue To The Pacific Northwest Electric Power Planning And Conservation Act*, 58 Wash. L. Rev. 175, 178 (1983).

While the case before the Court involves only a single transmission service contract, there are literally scores of contracts presently in force between amici and out-of-state utilities for the purchase, sale and exchange of power across federally owned and operated power lines. A summary of these contractual arrangements, as well as other interstate purchase, sale and exchange contracts, is appended to this brief as Appendix C. These types of contracts form the heart of the interstate bulk power market in the west, without which customers in many states would be denied the enormous benefits of efficient exchanges. This Court has previously recognized the reality of and the need for such interstate power sharing contracts [*see, Ark. Elec. Coop. v. Ark. Pub. Serv. Comm'n*, 461 U.S. 375, 381 (1983); *FERC v. Mississippi*, 456 U.S. 742, 757 (1982)], and has pointed out that unreasonable state restrictions on the free interchange of electricity have long been a matter of federal concern. *E.g., New England Power Co. v. New Hampshire*, 455 U.S. 331, 340-344 (1982). Indeed, as this Court stated in *FERC v. Mississippi, supra*, 456 U.S. at 757: "[it is] difficult to conceive of a more basic element of interstate commerce than electrical energy, a product used in virtually every home and every commercial or manufacturing

facility. No State relies solely on its own resources in this respect."

Moreover, to the extent that this "beneficial use" tax is added to the contractual charges for transmission service and power that the utilities already pay, it will either make otherwise advantageous transactions infeasible or will increase the costs of electric power to consumers.[5] By allowing Montana and other states to construct a wall of higher costs for bulk power transactions, then, both reliability and overall market efficiency will suffer. And to the extent the costs of purchased power are passed through to consumers, the higher costs of essential services like heating and lighting will cause dislocation and hardship.[6] To the extent utilities will have to look elsewhere for power, the undesirable consequences will be just as great, in the form of greater environmental harm and large but inefficient capital expenditures for new generating plants.

The adverse impacts of the costs imposed by taxes like Montana's, with its potential for proliferation, are not limited to the existing transmission system. The strengthening and growth of this sytem, in response to new opportunities in the bulk power market, will also be damaged. An example is the construction of a third 500-kV line between California and the Pacific Northwest which is expected to be completed in 1992. Called the California-Oregon Transmission Project, this line, which is 342-miles long in California alone, will add 1,600 megawatts of transmission capac-

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[5] The rates for transmission service by federal power marketing agencies are set within the Department of Energy and approved by the Federal Energy Regulatory Commission. 42 U.S.C. § 7172(a)(1)(B); 16 U.S.C. § 839e; *Pacific Power And Light Co. v. Duncan*, 499 F.Supp. 672 (D. Ore. 1980). To the extent the Montana tax imposes a surcharge on these federally-established rates, it is an unlawful intrusion on the exclusive authority of the Department and the Commission to set these rates, in violation of the Supremacy Clause. *See, Mississippi Power v. Moore*, ____ U.S. ____, 101 L. Ed. 2d 322, 340-342 (1988).

[6] These costs will fall most harshly on the elderly and the indigent. Businesses with power-intensive manufacturing processes will also be especially hard hit.

ity, enough in itself to carry all the power needs of a city the size of Seattle. This new line will expand the ability of the two regions to carry out seasonal exchanges and permit use of even more surplus (economy) energy.[7] However, the California portion of this new line will connect with federally owned lines in the Pacific Northwest, and its use will involve transmission service provided by the BPA. If the prospect of multiple taxation on the "beneficial users" of this new project is realized, then the benefits of this project, and even its viability, could be threatened since use of the new line, like the Pacific Intertie it augments, is governed by numerous contractual arrangements. *See*, Appendix C; Meek, *supra*, 13 Envtl. L. at 860.

Taxation of each of these transmission service contracts by every state along the route of the affected federal power lines, as is possible on Montana's theory of this case, is troubling to say the least. Montana's efforts to raise tax revenue from such "beneficial use" taxes accordingly comes at the direct expense of those who reside elsewhere and who rely on federal agencies for transmission of power interstate over federally owned lines.

II

MONTANA'S BENEFICIAL USE TAX PLAINLY VIOLATES THE ANTI-DISCRIMINATION PROVISIONS OF 15 U.S.C. SECTION 391

The transmission of electricity is governed not by the particular voltage that a transmission line can carry, but by the laws of physics. In an integrated, non-dedicated system, once electricity is generated and thereafter transmitted, the market where any particular watt of electricity will end up cannot be determined.

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[7] This project is noteworthy because it is being undertaken jointly by 17 California public and investor-owned utilities and agencies, including the federal Western Area Power Administration, which collectively serve a large majority of the electric power needs in California. Amicus Curiae Transmission Agency of Northern California, which manages the project, is now acquiring rights of way for the new power line and has issued and sold $60 million of revenue anticipation notes to finance the initial stages of the project.

Electricity follows the path of least resistance along transmission lines in any direction with no regard for a particular destination.

While any voltage electric line can be used to transmit power intrastate or interstate without distinction, generally high-voltage, high-capacity transmission lines (like the 500-kV lines that are the target of Montana's taxation statute) are used to transmit power over long distances because their carrying capacity is greater. In contrast, lines of 230-kV and below are most often used in regional transmission. Thus, any tax on transmission that is levied solely on high-capacity, high-voltage lines will of necessity have a disparate impact on the transmission of power interstate.

That fact was not lost on the Legislature of Montana when it purported to tax the "beneficial use" only of 500-kV electrical transmission lines within the state and exempted any transmission lines within the state of design capacity less than 500-kV even if such lines received power from a 500-kV line. *E.g.*, Mont. Code Ann. §§ 15-6-135, 15-6-141, 15-24-1203. Both the net effect and the intent of this statutory scheme are discriminatory. (Pet. for Certiorari, Case No. 89-266 at 16-18, 21-22) Portland General Electric and other out-of-state public and private utilities which receive power transmitted over 500-kV lines from Montana pay this tax while local residents whose power is also transmitted by BPA over lower voltage lines pay no tax at all. (*Id.*) While the activity remains the same—the transmission of electric power—Montana's tax falls more heavily on the interstate transmission of power and creates a burden on those who receive that power that is not shouldered by local residents.

This type of discrimination, directed as it is at the interstate transmission of power, is precisely what Congress sought to prevent with the passage of 15 U.S.C. Section 391. U.S. Code Cong. & Admin. News, 94th Cong., 2d Sess. 1976, Vol. 4 at 3866 (Jan.-Oct. 1976). In Section 391 Congress broadly and unambiguously prohibited discrimination in the generation and transmission of electricity in interstate commerce without regard to the capacity of the transmission line. According to the final committee report:

> The Senate's amendment prohibits any State or political subdivision of a State from directly or indirectly imposing any tax on the generation or transmission of electricity which discriminates against out-of-state users. This provision is effective for taxable years beginning after June 30, 1974. *Id.* at 4206.

Consistent with Congress' intent to prohibit all forms of tax discrimination relating to the interstate transmission of electrical power, 15 U.S.C. Section 391 provides that:

> No State, or political subdivision thereof, may impose or assess a tax on or with respect to the generation or transmission of electricity which discriminates against out-of-State manufacturers, producers, wholesalers, retailers, or consumers of that electricity. For purposes of this section a tax is discriminatory if it results, either directly or indirectly, in a greater tax burden on electricity which is generated and transmitted in interstate commerce than on electricity which is generated and transmitted in intrastate commerce.[8]

It is difficult to conceive of a situation that more directly conflicts with the express terms or the spirit of this statute than the Montana beneficial use tax at issue here. Despite the state's argument to the contrary, there can be no legitimate dispute that the tax "either directly or indirectly" inflicts a greater tax burden "on or with respect to" electricity that is "generated and transmitted in interstate commerce" than on electricity that is generated and transmitted in intrastate commerce. Interstate transmission of power is expressly singled out by the Montana taxation scheme,

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[8] One of the discriminatory taxation schemes Congress sought to prevent was struck down by this Court in *Arizona Public Services Co. v. Snead*, 441 U.S. 141 (1979). U.S. Code Cong. & Admin. News, 94th Cong., 2d Sess. 1976, Vol. 4 at 3865 (Jan.-Oct. 1976). As the final Senate Committee Report reflects, however, this was but "an example of discriminatory state taxation which is properly within the ability of Congress to prohibit through its power to regulate interstate commerce." *Id.* at 3866. Thus, Congress selected the broadest possible language for its anti-discrimination provision. *Cf., Aloha Airlines v. Director Of Taxation*, 464 U.S. 7, 12-14 (1983).

much of the intrastate transmission of power is expressly exempted from it, and the tax directly falls on out-of-state wholesalers, retailers and consumers of electrical power transmitted in interstate commerce.

Describing the tax as one that is levied on the "contractual right" to use a transmission line, as Montana purports to do, does not avoid Section 391's proscription. The statute expressly makes generation *and* transmission subject to its reach, and when the power here is being transmitted through the BPA's line it is indisputably being transmitted in interstate commerce. At a minimum, the tax indirectly falls on power transmitted in interstate commerce. And more pragmatically, the tax is a direct tax "on or with respect to" transmission since once the power leaves the generating facility the "use" to which the line is being put, by contractual right or otherwise, is nothing more than the transmission of power over the line. Accordingly, Montana's efforts to characterize the tax as on or with respect to something other than transmission is a subterfuge to avoid the congressional purpose in enacting Section 391.

Montana's claim that all 500-kV transmission within the state and out of it are treated the same also does not place its discriminatory tax beyond the reach of Section 391. The statute expressly prohibits discrimination—direct or indirect—in *any* form, in *any* amount and at *any* level of electric power transmission. Accordingly, any burden shouldered by power transmitted in interstate commerce that is not shouldered by all power transmitted locally gives rise to prohibited discrimination. *Arizona Public Service Co. v. Snead, supra,* 441 U.S. at 146. The state must tax everyone transmitting or receiving power equally or not tax anyone at all. *Id.* at 150-151; *compare, e.g., Duquense Light Co. v. State Tax Dept.,* 327 S.E.2d 683 (1984), *cert. denied,* 471 U.S. 1029 (1985). As the Nevada Supreme Court opined in invalidating a state tax on the receipt of electric power:

> The specific subject matter of the quoted federal statute [15 U.S.C. Section 391] is the discriminatory taxation of the generation or transmission of electricity. Although paragraph two of our amended statutes purports to tax only the value of the right to receive electricity, the difference is one without a

> distinction. Nevada's tax directly impacts on the transmission of electricity to Cities, who in turn, must increase the cost of electrical power to their resident-consumers. Under § 391 such an impact would be permissible providing the resident-consumers of Nevada were subject to the same burden. They are not.
>
> We reject the notion that Nevada's citizens are taxed in different forms thereby compensating for the added tax burden imposed by paragraph two on Cities. This contention is unsound simply because § 391 eliminates its availability. Regardless of a given state's choice of taxing and alternatives, the United States Congress has clearly foreclosed the right of states to directly or indirectly yoke the generation and transmission of electricity with an unequal burden. [Citation.]

State of Nevada v. City of Burbank, 100 Nev. 598, 691 P.2d 845, 848 (1984).

If Montana's efforts to avoid the statute are successful, Section 391 will become a meaningless piece of legislation. If the transmission of power can be relabeled a contractual right to use a federally owned line and then taxed in a discriminatory manner, virtually all such interstate transmissions will be open to such discriminatory taxation because such transmissions are invariably accomplished by transmission service contracts like the one involved here. Further, if a state can legitimately single out 500-kV lines for discriminatory treatment, then high-capacity interstate transmission will feel the brunt of special property taxes in each state through which those lines pass. This is the precise result Congress sought to avoid, and the result that amici curiae are most concerned about.

Where the language of a statute is clear, there is no room for further "interpretation" and courts must give effect to its plain meaning. *E.g., Howe v. Smith*, 452 U.S. 473, 483 (1981); *Consumer Product Safety Comm'n v. GTE Sylvania Inc.*, 447 U.S. 102, 108 (1980). This Court has previously resorted to the plain language of Section 391 to head off an even less threatening discriminatory taxation practice than the one involved here [*Ari-*

zona Public Service Co. v. Snead, supra, 441 U.S. 141] and, in keeping with the plain meaning of the statute, the outcome here must be the same. *See, Burlington No. R. Co. v. Okla. Tax Com'n*, 481 U.S. 454, 461 (1987); *Aloha Airlines v. Director Of Taxation, supra*, 464 U.S. at 12-14. Unless this Court sends a firm message that Section 391 means what it says, state legislatures will continue to use beneficial use taxes as a means to discriminate against the interstate transmission of electric power and thereby to defeat the congressional purpose in enacting the statute.[9]

III

MONTANA'S BENEFICIAL USE TAX VIOLATES THE SUPREMACY CLAUSE

The discriminatory impact of Montana's beneficial use tax not only runs afoul of Section 391's demand for equality of treatment for those who receive interstate transmissions on federally owned lines, it also violates the Supremacy Clause [U.S. Const. art. VI, cl. 2] for the same reason.

The Supremacy Clause is not avoided, as Montana contends, simply because the tax falls on a private interest (like PGE's contractual right) as opposed to a federal instrumentality (like the BPA's transmission line). Nor is that the distinction that this Court "validated" in cases like *United States v. County Of Fresno, supra*, 429 U.S. 452. Rather, the taxes on privately held possessory interests like the one involved in *County Of Fresno*, survived scrutiny under the Supremacy Clause because they were imposed in a nondiscriminatory manner so as to equalize the tax burdens between those who used federally exempt property within a state

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[9] Applying Section 391 as Congress intended creates no insuperable burden for Montana. The state already taxes the withdrawal of the coal that fires the Colstrip plant. *Commonwealth Edison Co. v. Montana*, 453 U.S. 609 (1981). The state also imposes a property tax on the Colstrip plant itself. The only tax that Montana will not be permitted to levy by virtue of applying Section 391 is its discrete tax on electrical transmission—the precise sort of tax that Congress expressly intended to foreclose.

and those who used similar, but non-exempt property, within the state. *See, e.g., Washington v. United States*, 460 U.S. 536, 542-547 (1983); *Memphis Bank & Trust Co. v. Garner*, 452 U.S. 392, 397-398 (1983).

Through the imposition of its beneficial use tax, however, Montana is not making any nondiscriminatory effort to "equalize" a disparity that exists between those who use federally exempt property within Montana and those who do not. *Compare, e.g., United States v. City Of Detroit*, 355 U.S. 466, 473-474 (1958). On the contrary, Montana's tax is intended to and does create an *additional burden* on those out-of-state who contract with the federal government for transmission service that is not borne by all those within the state who contract with the federal government for the same service. No possessory interest or beneficial use tax case decided by this Court can possibly be relied upon to justify a greater tax burden of this character imposed on those who deal with the federal government. Since *McCulloch v. Maryland*, 4 Wheat 316, 4 L.Ed. 579 (1819), this Court has consistently stated that that sort of blatant discrimination against those who deal with the federal government violates the Supremacy Clause. *See, United States v. County Of Fresno, supra*, 429 U.S. at 462; *and see, Washington v. United States, supra*, 460 U.S. at 542-543; *Memphis Bank & Trust Co. v. Garner, supra*, 459 U.S. at 397.

IV

MONTANA'S BENEFICIAL USE TAX VIOLATES THE INTERSTATE COMMERCE CLAUSE

In evaluating the validity of any state property tax under the Interstate Commerce Clause [U.S. Const. art. I, sec. 8, cl.3], this Court has always looked beyond the state's description of the challenged tax to determine its "practical effect" on interstate commerce. *Mobil Oil Corp. v. Commissioner Of Taxes*, 445 U.S. 425, 443 (1980); *accord, Nippert v. Richmond*, 327 U.S. 416, 431 (1946). If the practical operation of the tax discriminates against interstate commerce, this Court has never hesitated to invalidate it. *E.g., Maryland v. Louisiana*, 451 U.S. 725, 754-756, 759

(1981). Thus, while the commerce clause does not prohibit taxes levied on interstate commerce per se, the clause does provide a substantive guarantee that the taxation of intrastate and interstate commerce will be kept on an equal plane. *American Trucking Assn. Inc. v. Schneiner*, 483 U.S. 226, 280 (1987); *Westinghouse Electric Corp. v. Tully*, 466 U.S. 388, 403 (1984); *Phillips Chemical Co. v. Dumas School Dist.*, 361 U.S. 376, 383 (1960).[10] A state "may not tax a transaction or incident more heavily when it crosses state lines than when it occurs entirely within the State." *Armco, Inc. v. Hardesty*, 467 U.S. 638, 642 (1984).

In making its practical assessment of a tax's discriminatory impact, this Court has looked to four factors to determine whether a property tax will withstand constitutional scrutiny under the commerce clause:

> —Whether the tax is applied to an activity that has substantial nexus with the taxing state;
>
> —Whether the tax is fairly apportioned to activities carried on by the taxpayer in that state.
>
> —Whether the tax discriminates against interstate commerce; and
>
> —Whether the tax is fairly related to services provided by the taxing state.

See, e.g., Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 277-279 (1977); *and see, Commonwealth Edison Co. v. Montana, supra*, 453 U.S. at 617.

Moreover, this Court has also emphasized that the discriminatory character of a tax cannot be eliminated simply because interstate and intrastate taxpayers, who appear to be similarly situated, pay the same tax. "[A] tax must have 'what might be called internal consistency—that is the [tax] must be such that, if applied by every jurisdiction,' there would be no impermissible

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[10] The volume of in-state business favored or the volume of the interstate business disfavored is irrelevant to this discrimination analysis. *New Energy Co. v. Limbach*, 486 U.S. 269, 100 L.Ed. 2d 302, 310 (1988); *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 268-270 (1984).

interference with free trade." *Armco, Inc. v. Hardesty, supra*, 467 U.S. at 644-656 (*quoting Container Corp. Of America v. Franchise Tax Board*, 463 U.S. 159, 169 (1983)); *accord, American Trucking Assn. Inc. v. Schneiner, supra*, 483 U.S. at 284; *Tyler Pipe Ind. v. Dept. Of Revenue*, 483 U.S. 232, 243-248 (1987).

Montana's beneficial use tax fails to withstand scrutiny under the factors identified in *Complete Auto Transit* or under the internal consistency test articulated in *Armco*. Montana's beneficial use tax accordingly must be held unconstitutional under the Interstate Commerce Clause.

1. The Out-Of-State Utilities And Their Customers Who Are Subject To The Beneficial Use Tax Have No Legitimate Nexus To Montana For Purposes Of That Tax

The discrete tax at issue here is imposed only on the contractual right to receive transmission services from the BPA. That contract creates no presence on the part of the Colstrip owners in Montana. It simply creates an intangible right to receive transmission services out-of-state that are undertaken and performed by a separate and independent entity (the BPA) in the state.

Yet, a direct connection with the taxing state, involving the purposeful availment of that state's benefits and protections, historically has been required for any real property tax to pass constitutional muster. *E.g., Norfolk & Western Ry. Co. v. Missouri Tax Com.*, 390 U.S. 317, 323-324 (1968); *and see, Exxon Corp. v. Wisconsin Dept. Of Revenue*, 447 U.S. 207, 219-220 (1980); *West Point Grocery Co. v. Opelika*, 354 U.S. 390, 391-392 (1957). That historic justification is absent, however, in a case involving nothing more than a mere contractual right to receive power transmitted interstate. For that purpose, the Colstrip owners have no office in Montana, no employees in Montana, no marketing efforts in Montana and no sales in Montana. In short, the Colstrip owners have no nexus with Montana that could conceivably support the imposition of any real property tax, no matter what its label, with respect to the contractual right to

receive transmission service from the BPA that Montana is attempting to tax here.[11]

2. There Can Be No Fair Apportionment Of Montana's Beneficial Use Tax To Interstate Commerce

This criterion, like the need for a sufficient nexus to impose a property tax, requires that the tax be fairly apportioned to the taxpayer's activities in the taxing state. *E.g., Moorman Manufacturing Co. v. Bair*, 437 U.S. 267, 276-277 (1978). For purposes of the tax here, however, there *are no* activities. The right to possess, own and operate the transmission lines, as well as the control of the transmission of power over them, all reside exclusively in the BPA which provides the transmission service. For this pur-

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[11] No case of which amici are aware has ever extended the concept of a beneficial use real property tax to private persons who, while they may gain a benefit from a contract with the federal government, do not thereby acquire the direct right to physically use or possess the government's tax exempt property within the taxing state's borders. *E.g., United States v. County Of Fresno, supra*, 429 U.S. 452 (possession and use of federal government owned housing within the state); *City Of Detroit v. Murray Corp.*, 355 U.S. 489 (1958) (use of machinery and property owned by the government within the state); *United States v. City Of Detroit, supra*, 355 U.S. 466 (use and occupancy of property within the state); *United States v. Township Of Muskegon*, 355 U.S. 484 (1958) (same). The transmission service contract here in no way involves an assignment of the right to use any federal property. The most that can be said of the contract is that it gives the utilities the right to obtain a certain amount of power transmitted by the BPA over transmission lines the BPA owns, maintains and controls. By attempting to equate the intangible contractual right to obtain a service with a "beneficial use of government property," Montana is not only abandoning any previously established basis for the assessment of a real property tax, but also creating a dangerous precedent. The federal government is certainly one of the largest providers of services in the United States and many of these services, like electrical power transmission, are interstate in character. It will be a short step from the taxation concept proposed by Montana here to a plethora of state "beneficial use taxes" on those recipients of interstate government services who are deemed to acquire a "sufficient nexus or presence" within the taxing state solely by receiving services that pass through it.

pose—transmission service—therefore, the activity in interstate commerce is paying more than its fair share of the tax burden.[12] This is simply a form of discriminatory taxation that subjects out-of-state businesses and their customers to a tax not shouldered by local residents. Thus, while Montana purports to have a fair formula for allocating the tax, that begs the question. No tax can be fairly apportioned in the absence of any activity to which it can be apportioned. *See, Norfolk & Western Ry. Co. v. Missouri Tax Com., supra*, 390 U.S. at 325.

3. Montana's Beneficial Use Tax Discriminates Against Interstate Commerce

By limiting the tax to transmission lines of 500-kV and higher—high-capacity lines which transmit power interstate—Montana intended to inflict a disproportionate economic burden on those who receive electric power transmitted interstate. Intrastate customers who receive power off the very same line using 230-kV transmission are not subjected to the tax. Nor are intrastate customers who receive power over identical tax-exempt BPA lines at voltages lower than 500-kV. (Pet. for Certiorari in Case No. 89-266 at 16-18, 21-22)

The out-of-state residents in Oregon, Washington, California and elsewhere obviously are powerless to prevent the imposition of these discriminatory taxes. It is precisely this type of parochial taxation policy that should be subjected to the closest scrutiny under the commerce clause. *Cf., Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318, 330-336 (1977). The reasons are plain enough. Out-of-state residents cannot resort to the ballot box to ameliorate the effects of discriminatory taxes and therefore are inviting targets for the imposition of those taxes. Consequently, states like California, and more particularly the customers of the publicly and privately owned utilities involved here, will

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[12] To the extent that any burdens were created by the construction of the federal lines, those burdens already have been paid for. When the lines were constructed, Congress passed an accompanying impact tax which reimbursed all affected counties for any dislocation resulting from the placement of the lines. Pacific Northwest Electric Power Planning and Conservation Act of 1980, 16 U.S.C. § 839e(m) (1982).

subsidize the residents of Montana although they have neither sought nor obtained any benefit within the borders of Montana. Again, that result cannot survive constitutional scrutiny. *See*, pp. 12-13, *supra* (and cases cited therein); *and see, Boston Stock Exchange v. State Tax Comm'n, supra*, 429 U.S. at 329; *Halliburton Oil Well Cementing Co. v. Reily*, 273 U.S. 64, 72 (1963).

4. There Is No Fair Relationship Between Montana's Beneficial Use Tax On The Out-Of-State Utilities And Any Services Provided By The State

To withstand scrutiny under the commerce clause, a tax must also be reasonably related to the taxpayer's activities within the state imposing the tax. Thus, those who take advantage of a state's police and fire protection or other resources can be taxed in order to pay their fair share of those services as a result of their presence and activities within the state. *Commonwealth Edison Co. v. Montana, supra*, 453 U.S. at 626; *see, Portland Cement Co. v. Minnesota*, 358 U.S. 450, 464-465 (1959).

The Colstrip owners, however, already pay taxes for their presence in the state. They have no presence at all for purposes of the beneficial use tax imposed on the transmission of electricity over federal power lines. The only presence in Montana for that purpose is, as noted, exclusively federal: the BPA owns, operates and uses the lines and it also controls the transmission over them. The utilities involved, including PGE, merely receive the transmitted power outside the state. For that purpose, the utilities do not exercise any property or other rights within Montana and Montana provides the utilities with no police, fire protection or any other service that relates to the bare contractual right to receive the power.

5. Montana's Beneficial Use Tax Lacks Internal Consistency

To avoid creating an unlawful burden on interstate commerce, a property tax must also be imbued with internal consistency. That is "the tax must be such that, if applied by every jurisdiction, there would be no impermissible interference with trade." *See*, pp. 13-14, *supra* (and cases cited therein). A state-imposed property tax that conceptually could be relied upon by other states to impose multiple burdens on those who do business in interstate

commerce constitutes invidious discrimination because it creates the potential to interrupt the flow of free trade. *Id.; also see, Michigan-Wisconsin P.L. Co. v. Calvert*, 347 U.S. 157, 166-167 (1954). Yet, that would be precisely the pernicious effect of sanctioning Montana's beneficial use tax here.

The pretext for the tax is simply the presence of a 500-kV federally owned power line in the state and a transmission services contract that entitles a utility to receive power over the line when its needs may require. That condition exists in every state in the integrated system that cooperatively promotes the exchange of surplus electrical power. Every one of these states could impose such a tax thereby creating an onerous burden on the free flow of electrical power. This Court has never condoned that level of adverse impact on the distribution of goods in interstate commerce and, given the public's demonstrable need for inexpensive sources of electrical power, it should not do so here.

V

MONTANA'S BENEFICIAL USE TAX VIOLATES THE FOURTEENTH AMENDMENT

By virtue of its discriminatory impact on those who receive transmission of power interstate, Montana's beneficial use tax also violates the equal protection and due process clauses of the Fourteenth Amendment. While Montana claims that its tax is not discriminatory because all those who receive power over 500-kV lines are taxed in a similar manner in Montana, that classification is illusory. There is no distinction among the generators and transmitters of electrical power no matter what voltage is used and no logical way to determine who is using any particular voltage line and what electricity at any particular time. The classification here, by design and in practice, discriminates against those who receive electrical power through interstate transmission service while those who receive that same service intrastate, by design and in practice, escape any tax burden.

A tax differential directly burdening interstate commerce is a due process and equal protection violation of the most basic sort. *E.g., Exxon Corp. v. Wisconsin Dept. Of Revenue, supra,* 447

U.S. at 219-220; *Phillips Chemical Co. v. Dumas School Dist., supra,* 361 U.S. at 384-387. The discriminatory aspect of the beneficial use tax—imposed as it is on a bare intangible contractual right for transmission service to an out-of-state recipient for which there is no presence in Montana—is not rationally related to any legitimate state purpose. *Cf., Williams v. Vermont,* 472 U.S. 14, 23-27 (1985); *compare, e.g., Moorman Mfg. Co. v. Bair, supra,* 437 U.S. at 274; *Western & Southern Life Ins. Co. v. Bd. Of Equalization,* 451 U.S. 648, 668-674 (1981). Montana's attempt to impose this discriminatory extraterritorial tax on utilities which are disenfranchised within Montana and incapable of doing anything about it, is unlawful under the Fourteenth Amendment and should be condemned on this ground as well. *E.g., Metropolitan Life Ins. Co. v. Ward,* 470 U.S. 869, 878-882 (1985). *ASARCO, Inc. v. Idaho State Tax Com'n,* 458 U.S. 307, 315 (1982); *F. W. Woolworth Co. v. Taxation & Revenue Dept.,* 458 U.S. 354, 363-364 (1982).

VI

CONCLUSION

As this Court recognized more than forty years ago, where extraterritorial taxation is concerned "[t]here is no limit to the human mind's capacity to carve out from what is an entire or integral economic process particular phases or incidents, label them as 'separate or distinct' or 'local' and thus achieve its desired result." *Nippert v. Richmond, supra,* 327 U.S. at 423. Unless this Court acts to declare Montana's discriminatory tax unlawful, other states from which these amici receive power over federally owned transmission lines will most certainly follow suit with "beneficial use" taxes of their own. The public cannot afford that result and Congress and the Constitution will not permit it.

No one disputes that states can exact their fair share of tax revenue from those who do business within their borders. Montana's beneficial use tax, however, creates discrimination in violation of 15 U.S.C. Section 391, improperly burdens interstate commerce, and creates the kind of discrimination and favoritism that the due process and equal protection clause plainly forbid.

The use, transmission, interchange and allocation of electrical energy is a matter of nationwide concern. The integrated system that exists throughout the western, northwestern and southwestern United States hangs in a delicate balance and hinges on interstate contractual arrangements with both federal power agencies and public and private generators and transmitters of electrical power. These contracts are the precise target of Montana's tax and when similar beneficial use taxes are imposed by other states, the problems will be compounded.

Certiorari should be granted to review the erroneous decision of the Supreme Court of Montana.

DATED: September 8, 1989.

Respectfully submitted,

EZRA HENDON
(Counsel of Record)
JAMES C. MARTIN
CROSBY, HEAFEY, ROACH & MAY
Professional Corporation

By _____
EZRA HENDON
Attorneys for Amici Curiae

APPENDIX A

Stoel Rives Boley
Jones & Grey
[LETTERHEAD]

August 25, 1989

James C. Martin, Esq.
Crosby, Heafey, Roach & May
Attorneys at Law
1999 Harrison Street
Oakland, CA 94612-3573

Re: Consent to Filing of Amicus Brief

Dear Mr. Martin:

This is to advise you formally that Portland General Electric Company consents to your firm's filing of an amicus brief on behalf of various publicly and privately owned electric utilities regarding Portland General Electric Company's Petition for Issuance of Writ of Certiorari to the Montana Supreme Court in *Portland General Electric Company v. Montana Department of Revenue, et al.*, Supreme Court Docket No. 89-266.

Please let me know if you have any questions.

Very truly yours,

THOMAS H. NELSON
Thomas H. Nelson
Counsel of Record

APPENDIX B

State of Montana
[LETTERHEAD]

VIA FEDERAL EXPRESS

August 18, 1989

Thomas H. Nelson, Esq.
Stoel, Rives, Boley,
Jones & Grey
900 SW 5th Avenue
Suite 2300
Portland, OR 97204-1268

RE: Pacific Power and Light Company, et al, v. Department of Revenue, et al, Nos. ADV-86-069, ADV-87-081, and ADV-88-032

Dear Tom:

I have your letter dated August 14, 1989, concerning the beneficial use tax litigation in Montana. I attempted to contact Don Murray by telephone on several occasions concerning your request for an extension of time in which to file the post-trial findings and post-trial briefs in the third beneficial use tax case. I was unable to contact him.

* * *

The next matter raised in your letter dated August 14, 1989, is amicus curiae appearances by certain California utilities. Please be advised that I have no authority to accede to any amicus filings by such entities. I have no idea at this point what their interest in the litigation might be, and your letter dated August 14, 1989, sets forth no such explanation. Nor do I have the time to investigate what their interests and positions might be in this litigation. Very frankly, I view any intrusion by third parties into our litigation as being unnecessary. For that reason, I will not support or consent to any amicus curiae briefs in support of the petition for a writ of certiorari which the Colstrip owners have filed.

* * *

I hope that I have addressed the matters set forth in your letter dated August 14, 1989. If you have any questions, please call me.

Sincerely,

LARRY
Larry G. Schuster
Counsel

LGS:rk
lgs44q
cc: Mary Whittinghill
Donald R. Murray

APPENDIX C

SUMMARY OF CONTRACTUAL ARRANGEMENTS ENTERED INTO BY AMICI FOR THE INTERSTATE PURCHASE AND TRANSMISSION OF POWER

Amici have surveyed the number and value of the contracts they have entered into for the transmission of power across state lines, both utilizing federally-owned and operated facilities and using other facilities. This survey reflects the following:

Pacific Gas and Electric Company (PG&E) which is the largest investor-owned gas and electric utility in the United States, is the principal source of electric power for four million customers, serving an area of northern and central California with a population of more than ten million. PG&E has entered into contracts with three Pacific Northwest utilities to exchange 650 MW of power between 1991 and 2011 at an estimated value between $10 and $15 million per year. These exchanges rely on transmission service over federal lines.

In addition, PG&E buys large amounts of economy energy from the Northwest, pursuant to contracts with over a dozen utilities. In 1988, purchases from non-federal sellers which required transmission service from federal agencies totalled 2,837,978 kilowatt hours of energy, at a cost of over $65 million.

The Sacramento Municipal Utility District (SMUD) which supplies electric power to all of the greater Sacramento, California, area has entered into three long term power purchase contracts with Pacific Power and Light Co., located in Portland, Oregon, covering the period between 1990 and 2014. These contracts provide for the sale of 100 MW of power and the total value of the purchases is approximately $28 million per year. In addition, SMUD has contracted with other California companies for the transmission of power across interstate lines at an estimated cost of $670,000 per year and as a participant in the Transmission Agency of Northern California is entitled to receive 207 MW of power from a proposed 500-KV line on the Intertie system at a cost of $83 million.

The Los Angeles Department of Water and Power (LADWP), the largest municipally-owned utility in the United States, supplies the electric power needs for the City of Los Angeles. It has entered into numerous separate contracts for the purchase of power from out of state, including the following: eight contracts with separate utilities for specified amounts of power; enabling agreements with 25 out-of-state utilities or governmental agencies which specify no fixed amount, but under which transfers of energy could occur; an additional three contracts in which the amount of power purchased is a function of the capacities and operating characteristics of the particular plant. Los Angeles has nine separate transmission agreements for the receipt of interstate power. The great bulk of this power is transported across federally-owned facilities.

Los Angeles purchases capacity and energy from Bonneville Power Administration (BPA) and other Pacific Northwest utilities to be delivered over the Pacific DC Intertie +/− 1000 kV high-voltage DC line. These purchases are used by Los Angeles during on-peak hours in conjunction with other resources for economic system operation. In addition, purchases of economy energy are made from utilities in Nevada, Arizona, New Mexico and Colorado. LADWP's entitlement from the Hoover Power Plant in Nevada (491 MW) is considered a long term firm purchase. LADWP also purchases capacity from Utah Power & Light Company (64 MW) and from the Montana Power Company (105 MW).

Southern California Edison Company (SCE) which delivers electric power to 3.8 million customers in 15 central and southern California counties and 150 incorporated communities, has contracts with several utilities or governmental agencies for the purchase of power. These include Arizona Public Service Company, Pacific Power and Light Company, Portland General Electric Company, Washington Water Power, and the Bonneville Power Administration. In addition, SCE transmits power from three power plants located outside the State of California, which it owns. In total, these agreements account for the transmission of over 3,400 MW of power, utilizing the Pacific Intertie and other federally and publicly operated power lines.

San Diego Gas and Electric Company (SDG&E) which is responsible for the electric power needs of 1,030,000 customers has a contract for the purchase of 75 megawatts of power through the year 2013 with Petitioner Portland General Electric Company and a transmission service agreement on the northern section of the Pacific Intertie for transmission of 75 megawatts. Pursuant to a series of transmission agreements between Pacific Gas and Electric, Southern California Edison, Western Area Power Administration, SDG&E and various municipal utilities relating to the southern section of the Pacific Intertie, San Diego Gas and Electric Company has transmission rights for 269 megawatts of power supplied under the Portland General Electric Company contract and for surplus hydro-electric power which SDG&E purchases when it is available from various utilities in the northwest. SDG&E makes economy spot purchases and sales of power utilizing BPA lines, the Pacific Intertie and Western Area Power Administration lines.

Southern California Public Power Authority (SCPPA) is a joint powers agency created to finance the acquisition of generation and transmission projects on behalf of its members. The members of SCPPA are the California cities of Anaheim, Azusa, Banning, Burbank, Colton, Glendale, Pasadena, Riverside, Vernon, the Department of Water and Power of the City of Los Angeles (LADWP), and the Imperial Irrigation District.

SCPPA's transmission facilities in which its members have ownership or entitlement are as follows:

1. The Cities of Anaheim, Azusa, Banning, Colton, Riverside and Vernon are participants in the California-Oregon Transmission Project ("COTP"), have an entitlement of approximately 121 megawatts in the COTP.

2. LADWP, and the Cities of Burbank, Pasadena and Glendale, own 50 percent of the Pacific DC Intertie Transmission Line. Each of those utilities has a variety of contracts of purchase capacity and energy from BPA and other Pacific Northwest utilities for delivery over the DC transmission facilities. In addition, the Cities of Anaheim, Azusa, Banning, Colton and Riverside are preparing to enter into an

Agreement with the Cities of Burbank, Glendale and Pasadena to purchase transmission service for a term of 20 years over the DC transmission facilities. Anaheim, Azusa, Banning, Colton and Riverside contemplate entering into a 20 year agreement with BPA to purchase firm capacity and energy. Such capacity and energy will be delivered at the Nevada/Oregon border by BPA over its entitlement in the Pacific DC Intertie transmission lines

3. LADWP and the Cities of Anaheim, Burbank, Glendale, Pasadena and Riverside are participants in the Intermountain Power Project, a large coal-fired generating plant consisting of a 2,800 megawatt unit located in Delta, Utah. As a part of the Intermountain Power Project, these Cities are also participants in a DC transmission line running from the Intermountain Power Project in Delta, Utah through the states of Nevada and California and terminating at a switching station near Adelanto, California.

The Transmission Agency of Northern California (TANC) is a public entity of the State of California formed pursuant to California Government Code Sections 6500 *et seq.*, by which public entities may jointly exercise the powers they have in common.

The members of the TANC are the cities of Alameda, Biggs, Gridley, Healdsburg, Lodi, Lompoc, the Modesto Irrigation District, the City of Palo Alto, the City of Redding, the City of Roseville, the Sacramento Municipal Utility District, the City of Santa Clara, the Turlock Irrigation District, the City of Ukiah, and its associate member, the Plumas-Sierra Rural Electric Cooperative, Inc. All of the members, except the cities of Biggs and Gridley, are participating through TANC in the development of the California-Oregon Transmission Project. Through COTP the members intend to contract for power from utilities in the Pacific Northwest.

Three of the members of TANC, through the M-S-R Public Power Agency, described below, are also entering into a 20-year agreement with BPA for electric power.

The M-S-R Public Power Agency was also formed pursuant to California Government Code Section 6500 *et seq.* in 1980, and is comprised of the cities of Santa Clara and Redding, and the Modesto Irrigation District.

In 1983 M-S-R acquired an interest in Unit Four of the San Juan Unit Four Electric Generating Station located in New Mexico, near the City of Farmington. This coal-fired plant is operated by the Public Service Company of New Mexico (PNM). Among its owners are PNM, Tucson Electric Power Company (TEP), the City of Farmington, the City and County of Los Alamos, and the Century Power Corporation. In that region M-S-R has entered into wholesale power contracts with a number of entities, one of which, an Interconnection Agreement between M-S-R and TEP, provides for the use of TEP's contract right to transfer power over the federal transmission lines of Western Area Power Administration.

The Northern California Power Agency (NCPA) has a membership which includes all of the members of TANC except for the Sacramento Municipal Utility District and the Modesto Irrigation District. It was organized to represent its members in the purchase, generation, distribution, interchange, pooling and sale of electricity. Each of NCPA's members owns and operates an electrical system to distribute electric power and energy for public and private use. Customers of NCPA's members range the gamut typical of electric users, including the federal government. For example, the City of Alameda supplies power to the Alameda Naval Air Station.

To supply its members' needs, NCPA built approximately 200 MW of electric generating capacity in 1983 in the Geysers Known Geothermal Resource Area in Sonoma and Lake Counties, California. The steam is a federal resource piped up wells from federal leaseholds held by NCPA. NCPA is awaiting the completion next year of the North Fork Stanislaus Hydroelectric Project, a water and power project licensed under the Federal Power Act to the Calaveras County Water District, from which NCPA and its members will have another approximately 200 MW of generating capacity. Additionally, NCPA is currently reviewing proposals for additional supplies to serve its member entities in the future,

including contracts for the purchase of wholesale power from the Pacific Northwest. NCPA also purchases power from sources as far away as Montana and sells surplus power. These purchases of power and sale of surplus power rely heavily on federally operated transmission lines.